77-747

No. 77-

Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1977

WALTER J. FLECK, *et al.*,

Appellants,

vs.

WARREN SPANNAUS, *et al.*,

Appellees.

On Appeal from the United States District Court for the District Of Minnesota

JURISDICTIONAL STATEMENT OF APPELLANTS WALTER J. FLECK, ET AL.

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The Scheffer Press, Inc.—(312) 263-6850

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JURISDICTIONAL STATEMENT OF APPELLANTS WALTER J. FLECK, ET AL.

JURISDICTIONAL STATEMENT

Appellants, Walter J. Fleck, a salaried employee of Allied Structural Steel Company, Edyth A. Hamler, another salaried employee of Allied Structural Steel Company, E. A. Richert, Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan, and Allied Structural Steel Company, a Delaware corporation, appeal the judgment of a three-judge United States District Court for the District of Minnesota which holds that the Minnesota Private Pension Protection Act, *Minn. Stat.* §181 B.01 *et seq.* (1974), which, *inter alia,* abrogated the entitlement and vesting standards of then existent

private pension contracts of employers who closed plants in Minnesota and created its own reduced entitlement and vesting standards for such a contingency, did not impair the obligation of contracts within the meaning of article I, §10, clause 1 of the Constitution.

OPINION BELOW

The opinion of the District Court is not yet reported. It is printed at App. 1a.

JURISDICTION

Appellants sued to enjoin the enforcement of the Minnesota Private Pension Protection Act as being unconstitutional. A three-judge district court entered a judgment on September 2, 1977, which it revised September 22, 1977, denying the injunction and upholding constitutionality. Appellants filed Notice of Appeal on September 28, 1977. The jurisdiction of this Court is conferred by 28 U.S.C. §1253.

PROVISION OF THE CONSTITUTION INVOLVED

U.S. Const. art. I, §10, cl. 1 states in relevant part:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .

STATUTE INVOLVED

The Minnesota Private Pension Protection Act, *Minn. Stat.* §181 B.01 *et seq.* (1974); Laws 1974, ch. 437, is printed in the Appendix at App. 1b.

QUESTION PRESENTED

Do states have greater latitude under the Contract Clause of the Constitution to impair the obligation of private contracts than those of public bodies?

STATEMENT

Appellant, Allied Structural Steel Company ("Allied"), operated an office in Minnesota, employing thirty people.

In August, 1963, Allied instituted a noncontributory pension plan for its employees. Contributions to the plan were not earmarked for, nor allocated to, specific employees but were paid in a gross amount that actuaries calculated to be sufficient to meet the obligations of the contract to the covered group. The actuarial calculations assumed that not all employees would remain in Allied's employment long enough to attain vested benefits. Under the plan, an employee's benefits vested if:

1) the employee was 55 or older and his age added to his years of service totaled at least 75, or

2) the employee was younger than 55 and his age added to his years of service totaled at least 80.

Under the plan, if employees began working for Allied at age 26, their retirement benefits would vest when they reached age 53 and retired.

On April 10, 1974, the Minnesota legislature enacted the Minnesota Private Pension Protection Act.[1] It pro-

---

[1] The Minnesota Act at best was but a stop-gap, for it contained a so-called "self-destruct" provision (*Minn. Stat.* §181 B.17 App. 13b) that it was to become "null and void" upon "institution" of a federal law guaranteeing the payment of a substantial portion of an employees vested pension benefits. In fact, prior to passage of the Minnesota Act the House of Representatives had passed its version of what became the federal Employee Retirement Security Act of 1974 (ERISA) on February 28, 1974. 120 *Cong. Rec.* 4781-82 (1974). On March 4, 1974, the Senate passed its version and selected members to

vided that if an employer substantially closed a plant he would owe his employees "a pension funding charge" for all years of service over ten that were not vested under the employer's plan. In effect this imposed guaranteed, retroactive vested pension benefits after ten years of service. Under the Act, if an employee began working for Allied at age 26, his retirement benefits would vest at age 36—seventeen years earlier than under this contract with Allied. (A special master later determined that, to meet the statutorily imposed provisions, Allied would have to pay from $114,171 to $185,751 more than it had contracted to pay.)

Later in 1974, Allied began to phase out its Minnesota office and Minnesota sought to enforce the early-vesting provisions of the Act.

Allied and the fiduciaries of its pension plan brought suit in the Northern District of Illinois to have the Minnesota Act declared unconstitutional and its enforcement enjoined. The action was transferred to the District of Minnesota under 28 U.S.C. §1404.

The United States District Court for the District of Minnesota convened a three-judge court. 412 F.Supp. 366 (1976). It certified several state-law questions to the Minnesota Supreme Court, but the answers of that court left the federal constitutional questions dispositive. (*Fleck* v. *Spannaus*, ... Minn. ....., 251 N.W.2d 334 (1977)).

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[1] (Continued)
meet with representatives of the House in conference. *Id.* at 5011. The House selected its conferees on April 2. *Id.* at 9286. It was thus apparent on April 10, 1974, that any resulting federal bill would fulfill the qualifications of §181 B.17 of the Minnesota Act. The conference committee reported to the House on August 12 (*id.* at 27708) and to the Senate on August 13 (*id.* at 27997). Within ten days, both Houses passed ERISA (id. 29215-16, 29963). The President signed the bill on September 2, 1974.

In the proceedings Minnesota conceded that it impaired Allied's contracts with its employees. (App. 5a.) Nevertheless, the District Court held the Act a constitutionally permissible impairment of contracts because of the "considerable deference" it believed must be accorded state legislation impairing private, as distinguished from public, contracts. It held that what was taught in *United States Trust Company* v. *New Jersey*, ... U.S. ....., 52 L.Ed.2d 92 (1977), enforcing the Contract Clause, was limited to protection of public contracts and is not applicable to private contracts. App. 3a-4a, 8a-9a.

THE QUESTION IS SUBSTANTIAL AND SHOULD BE DECIDED BY THIS COURT

At last Term the Court, in *United States Trust Company* v. *New Jersey, supra,* invelving the contract of a public agency, held that the Contract Clause has an "important place in our constitutional jurisprudence" and that "its limitation on state power was [not] illusory"; it enforced the Clause against an agency of New Jersey and New York.

However, the opinion at bar limits *United States Trust* only to impairments of *public* contracts holding that "policy judgments" of state legislatures to impair *private* contracts are entitled to "considerable deference" even though they impose uncontracted-for burdens. App. 8a-9a. The Court of Appeals for the Eighth Circuit, in another case arising in the District of Minnesota in which the appeal did not involve the constitutional question, has found that "The Minnesota Pension Act directly intrudes upon the employer's substantive obligations under the pension plan, obligations arrived at freely through collective bargaining, and appears in its operation to be a unique legislative act." ***White Motor Corporation*** v.

Malone, 545 F.2d 599, 604 (1976), now before this Court as No. 76-1184. The pension contract at bar was not collectively bargained as in *White Motor.* Nevertheless, it was as binding on the employer as in *White* and as enforceable, according to its terms, by employees.[2]

The "uniqueness" and boldness of the Minnesota Act is shown by the Act. It contains no recitals or legislative findings of any emergency existing in Minnesota, threat to the welfare of any substantial segment of the population or any of the rationalizations advanced by the District Court, *sua sponte,* to justify the Minnesota legislature saying, in substance, "If you substantially close a plant in Minnesota and have a pension plan, you must pay pension benefits that we ordain rather than those you contracted to pay."

If the District Court opinion be permitted to stand as a permissible gloss on, or reading of, *United States Trust,* it would mean that the limitation of the Contract Clause on state power to impair private contracts would indeed be "illusory" because, to paraphrase from the District Court opinion (App. 8a-9a), the State of Minnesota, or any state, can always assert an allegedly "strong and

[2] By separate motion filed simultaneously with this Statement we are moving that consideration of this Statement be expedited and that, if jurisdiction be noted, this case be heard at the same time as *White Motor* in which the constitutional point urged here is possibly latent. That case, involving the same Minnesota Act, comes to this Court solely on the question of whether the 8th Circuit's ruling that the Minnesota Act was pre-empted by the National Labor Relations Act was correct. The constitutional question which we urge, was pleaded, but not reached, in *White Motor,* so it is still open.

legitimate interest in protecting the economic welfare" not only of its "senior citizens" but its creditor citizens, its young parent citizens, etc. *ad infinitum.*

The vast business and wealth of the country is regulated largely by private, not by public, contracts. Stability of the former was basically what the Constitution was designed to protect:

Edmund Randolph, in the Virginia Convention which ratified the Constitution, argued that the Contract Clause was beneficial because it prevented "interferences of the State Legislatures with private contracts." Warren, *The Making of the Constitution,* at 555, quoting Elliot's *Debates on the Adoption of the Consitution,* III, 478-79. James Madison, writing as Publius in Federalist No. 44, maintained that the Contract Clause proscribed "legislative interferences in cases affecting personal rights." *The Federalist* at 301 (Jacob E. Cooke, ed., 1961). Soon after the Constitution was adopted, courts held that the Contract Clause prevented state legislatures from interfering with private contracts. See *Alexander Champion and Thomas Dickason* v. *Silas Casey* (C.C.D.R.I. 1792) and *Church Land Cause* (C.C.D.Vt. 1799), both described in I Warren, *The Supreme Court in United States History* at 66-9. *Cf. Holmes* v. *Lansing,* 3 Johns. 73 (N.Y. 1802) and *Grimball* v. *Ross,* T.U.P. Charlt. 175, 180-81 (Ga., Super. Ct. 1808) (laws held not to violate the Contract Clause).

The first application of the Clause to the protection of public contracts appears to be *Fletcher* v. *Peck,* 6 Cranch (10 U.S.) 87 (1810), in which Chief Justice Marshall said:

> Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between

> two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. (6 Cranch at 137)

Marshall then went on to demonstrate that public contracts were protected. It is worthy of note that in Justice Johnson's partial dissent he said:

> There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection of individual rights against the acts of state legislatures. (6 Cranch at 144)

Application of the Contract Clause to public contracts, as both *Fletcher* v. *Peck* and later cases demonstrate, is restricted by the fact that one legislature, by converting its acts into contracts, cannot prevent the exercise of legitimate police power by subsequent legislatures. (*United States Trust,* 52 L.Ed.2d at 110-11.) Private contracts suffer no such inhibition.

Whatever may be said as to application of the Contract Clause to public contracts, it is beyond doubt that the District Court has attempted to reverse history and all legal teaching by propounding a doctrine that private contracts are less protected by the Constitution than public contracts, or, stated another way, a doctrine that a more lax standard of review is applied in reviewing legislation impairing private contracts than that impairing public contracts. This doctrine has not heretofore been the law. *See, e.g., Coolidge* v. *Long,* 282 U.S. 582 (1931).

The severity of the impairment is without question. In *United States Trust,* as the dissent points out, 52 L.Ed.2d at 121-23, there was no attempt to alter either the principal or interest obligations of the bonds in question, but an effort to change the underlying funding arrangement. Nevertheless, the Court held the legislation unconstitutional.

As we read the dissent in *United States Trust,* there is nothing in it, taken in factual context, that justifies what the District Court did here. It is our view that on plenary hearing the Court, even though it divided in *United States Trust,* can and should unite in reversing the District Court. The Act here is "unique" as found by the 8th Circuit; it is unprecedented. *Cf. Home Building Ass'n* v. *Blaisdell,* 290 U.S. 398 (1934). Here, the legislature did much more than alter a remedy. This Act makes a new contract for the parties, forcing retrospective burdens or obligations on one and emoluments on the other. If the District Court opinion be permitted to stand and spawn progeny, there would be scant limit to what state legislatures could do to existing contracts—the populace would be subjected to legislative impetuosity and tyranny.

True, states can impair contracts, but only if it is both reasonable and necessary to serve an important public purpose (*United States Trust,* 52 L.Ed.2d at 114). But enforcing retrospective vesting earlier than a pension plan provides is not such a purpose. At most, late vesting is an unsatisfactory way of structuring a pension plan;

it is not an over-riding danger to the public. Most of the public, particularly in a predominantly agricultural state, does not enjoy private pensions.[3] The Minnesota Act, as heretofore voted, contains no recitals of any threat to the welfare of the public, nor legislative findings of an emergency, nor any of the rationalizations advanced *sua sponte* by the District Court. There is no showing of any important public purpose that would justify the legislature's forcibly adding obligations to existing contracts.

The unreasonableness of the Minnesota Act, even assuming a public need, is shown by contrasting it to the

[3] Less than one-third of Minnesota's non-government workers had private pensions, as tabulated below, assuming that, in Minnesota, the percentage of employees with private pensions was the same as that in the United States. Of course, most of these pensions were unaffected by the Minnesota Act because not many plants with pension plans were closed. The column below, "Thousands of Employees", is taken from U.S. Dep't of Commerce, *1976 Statistical Abstract of the United States* at 367 and 633. The column 'Percent of Employees with Private Pensions" is taken from *id.* at 307. The final column is calculated.

Occupation	Thousands of Employees	Percent Of Employees With Private Pensions	Thousands Of Employees With Private Pensions
Farm	483	7%	34
Wholesale & Retail	370	35%	129
Manufacturing	313	61%	191
Services	279	24%	67
Transportation and Public Utilities	90	61%	55
Finance, Insurance and Real Estate	75	52%	39
Construction	62	34%	21
Mining	14	72%	10
Totals	1,685		546 or 32.4%

Employee Retirement Income Security Act of 1974 (ERISA), P.L. 93-406, 88 *Stat.* 829. Even though Minnesota is commanded by the Constitution to respect existing contracts while Congress is not, Congress was far more respectful of contract rights than was Minnesota. For example, Representatives Ashbrook, Erlenborn, Eshleman, Hansen and Quie believed Congress lacked the constitutional power to "change the contract of an employer from a promise to make certain contributions to a fund to a promise to pay the pension supported by a pledge of the employer's assets." Supplemental Views, *H. R. Rep. No.* 533, 93d Cong., 1st Sess. (1973). Congress acted prospectively in lowering vesting and entitlement requirements and did not force any employer to change his contracts. ERISA was signed by the President on September 2, 1974, to become effective in part on January 1, 1975, and in other parts at the start of the first pension plan year commencing after January 1, 1975. An employer dissatisfied with ERISA could keep any pension plan he wished, with the only penalty being the possible loss of a tax deduction. Or he could simply terminate his plan. Many did so.[4] Minnesota did not even grant employers this element of fairness. Minnesota did not give objecting or financially pressed employers any way of avoiding the legislatively imposed terms; it rewrote the terms of the employment contracts by *force majeure.*

[4] In a speech on the Senate floor, Senator Javits reported that an IRS survey indicated that perhaps 30% of the pension plans existent before ERISA was passed may close down. 134 *Cong. Rec.* S 13528 at S 13530 (daily ed. Aug. 4, 1977). From ERISA's enactment to November 5, 1977, over 19,000 pension plans filed to terminate. Telephone interview on November 17, 1977 with Joel Greenblatt, Pension Benefit Guaranty Corporation, 2020 K St. N.W., Washington, D.C. 20006 (202) 254-4817.

CONCLUSION

It is respectfully suggested that if the District Court opinion is not reviewed it will stand as precedent that *United States Trust Company* v. *New Jersey*, which was most carefully considered by this Court, applies only to public contracts—that the vast majority of the contracts in this country fixing the rights of rich and poor, debtors and creditors alike, have but illusory protection under the Contract Clause, for it is difficult to imagine a more direct assault upon the obligation of private contracts than that authorized by the opinion of which we seek review.

Respectfully submitted,

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November 25, 1977

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

No. 3-75 Civ. 178

Walter J. Fleck, Edyth A. Hamler, E. A. Richert, as Fiduciary of the Allied Structural Steel Company Salaried Employees' Pension Plan, and Allied Structural Steel Company, a Delaware corporation,

Plaintiffs,

v.

Warren Spannaus, E. I. Malone, Phyllis Speilman and Allied Structural Steel Company Salaried Employees' Pension Plan,

Defendants.

Before HEANEY, Circuit Judge, and DEVITT and ALSOP, District Judges. [Filed September 2, 1977]

HEANEY, Circuit Judge.

The plaintiffs brought this action to contest the enforceability and constitutionality of the Minnesota Private Pension Benefits Protection Act, Minn. Stat. §181B.01 *et seq.* (1974) (hereinafter the Pension Act). The relevant facts are set forth in *Fleck* v. *Spannaus*, 412 F.Supp. 366 (D. Minn. 1976). In that decision, Judge Alsop held that the Pension Act was not preempted by the Employee Retirement Security Act of 1974, 29 U.S.C. §1001 *et seq.* (hereinafter ERISA) until January 1, 1975, and that a three-judge court was necessary to decide the various constitutional issues raised. On August 5, 1976, the three-judge court certified several questions to the Minnesota Supreme Court concerning the Pension Act's "self-destruct" provisions and held that the individual plaintiffs, two employees of Allied Structural Steel Company (hereinafter Allied) and the pension fund trustee, lacked standing to sue. In addition, the court ordered the appointment of a

special master to take evidence and make findings on certain factual matters.

Pursuant to Judge Alsop's certification order, the Minnesota Supreme Court held that the Pension Act continued in effect until January 1, 1975, when the provisions of ERISA preempted the state act and that this preemption preserved the pending causes of action. In other words, the terms of the Pension Act were in force and applicable to the eleven employees terminated by Allied on July 31, 1974.

On April 7, 1977, the special master issued his findings to which the parties subsequently stipulated. In particular, he found that:

1) it was impossible to determine which contributions by Allied to the plan were allocable to the terminated employees;

2) there were insufficient assets in the pension fund to pay the terminated employees after paying all employees who had vested rights under the plan;

3) the possibility of a plant closure was not considered in calculating Allied's annual contributions to the pension plan; and

4) the cost of prepaid deferred annuities which Allied would have to purchase for the terminated employees ranged from $114,171.93 to $185,751.00.

Before this three-judge court, Allied claims the Pension Act suffers the following constitutional infirmities:

1) it impairs the obligation of contract; and

2) it violates the due process, equal protection and commerce clauses of the United States Constitution.

Although Allied raises each of these issues in its initial complaint, they seem to rely almost entirely on the contract clause argument. Accordingly, our decision will focus primarily on this issue.

I. *The Impact of United States Trust Co. of New York v. New Jersey.*

Over the last century, the Contract Clause of the United States Constitution has played a limited role in constitutional adjudications concerning limitations on state power. A recent decision of the United States Supreme Court, *United States Trust Co. of New York* v. *New Jersey*, ... U.S. ....., 52 L.Ed.2d 92 (1977), provides the most definitive statement on the current status of the Contract Clause. This case involved a statutory covenant between New York and New Jersey which limited the ability of the Port Authority to subsidize rail passenger transportation from revenues and reserves pledged as security for bonds issued by the Authority. In 1974, the legislatures of both states repealed the security promise in the 1962 covenant. The legislation was sought when it became apparent that, in providing a greater share of its revenues for rail mass transit, Port Authority reserves would drop below levels promised as security in the original covenant. *United States Trust Co. of New York* v. *New Jersey, supra* at 52 L.Ed.2d 102-104.

In assessing the bondholders' Contract Clause challenge, the Supreme Court began by drawing an important distinction between general regulatory legislation impairing a range of private contracts and legislation abrogating a particular contract to which the state was a party. As to the former, the Court acknowledged that a more relaxed standards of review must apply; but when the state itself was a party, it conceded that complete deference to the legislature's judgment was inappropriate.

> The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. • • • As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.
>
> • • • •

> In applying this standard [to the instant case], however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised.

United States Trust Co. of New York v. *New Jersey, supra* at 52 L.Ed.2d 109-110, 112.

Thus, an important first step in analyzing the constitutionality of a particular impairment is to determine the nature the contractual relation with which the law conflicts.

A second issue addressed by the Court in determining the constitutionality of a particular impairment is the extent of that impairment. *Id.* at 113. Without drawing a clear distinction between substantial and insubstantial impairments, the Court, at several points in the opinion,[1] suggested that a factor to be considered in determining the extent of impairment is the legitimate expectations of the contracting parties. Apparently, to the extent the obligation imposed or abrogated by the challenged legislation was, in fact, or could have been anticipated by the contracting parties, the impairment of those bargained for expectations is diminished.

Ultimately, the Court held that an impairment can be sustained only if reasonable and necessary to serve important purposes of the state. *Id.* at 114. Total repeal of the 1962 covenant was not necessary, in the Court's judgment, because less drastic modifications of the security terms would have accomplished that state's objectives. The legislation was not reasonable because the state was well aware of pending mass transit problems when the covenant was enacted. *Id.* at 114, 115.

With this review of the Supreme Court's most current statement on the Contract Clause, we now turn to the instant case.

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[1] *United States Trust Co. of New York* v. *New Jersey*, ... U.S....., 52 L.Ed.2d 92, n.17, n.26 (1977).

II. *The Extent of Impairment.*

Allied argues and the State of Minnesota seems to concede that there has been an impairment of contract. Our attention is directed then to the extent of that impairment. In this regard, Allied contends that the impairment is substantial because the Pension Act burdens employers with pension obligations that were actuarially anticipated.[2]

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[2] The actuarial assumptions and funding method used in developing the Allied pension plan are set forth at Exhibit 7 of the Special Master's Findings:

Mortality rates—Group Annuity Table for 1951 projected to 1960, set back 5 years for women.

Disability rates:

Age	*Rate (%)*
37	.1
42	.1
47	.2
52	.6
57	1.1
62	3.2

Termination rates before retirement, all causes:

	Rate (%)	
Age	*Men*	*Women*
22	5.4	5.4
27	4.5	4.5
32	3.3	3.3
37	2.0	2.0
42	1.0	1.0
47	.7	.5
52	1.3	1.0
57	2.2	1.8
62	4.9	4.3

Salary scale:

Age	*Present salary as a percent of salary at 65*
22	33.1%
27	40.9
32	49.0
37	57.4
42	65.9
47	74.4

First, Allied argues that their contributions to the pension plan were actuarially determined on the basis of certain assumptions and that by providing benefits to those who would have forfeited their benefits under those assumptions, unanticipated liability is imposed. This argument is belied by Allied's own admission that the possibility of plant closure was not relied upon by their actuaries in calculating plan contributions.[3]

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[2] (Continued)

52	82.8
57	91.1
62	98.2

Retirement age—66, or completion of service requirement if later.

Interest rate—4½%.

Valuation of assets—At cost, with accrual of unpaid compnay contribution.

Funding method—Entry age normal—cost-frozen initial liability.

[3] Allied's argument in this regard does highlight a different aspect of the termination problem. Because plant closure is not actuarially anticipated, forfeiture of pension benefits for this reason may actually provide a windfall to the employers. As noted in *Lucas* v. *Seagrave Corporation*, 277 F.Supp. 338, 345 (D. Minn. 1967):

> [I]t has been asserted that an employer's pension plan contributions are determined by an actuarial formula which assumes that any employee whose employment is terminated, forfeits his pension benefits. • • • However, such an assumption may not cover the occurrence of a group termination. The actuarial formula assumes a reasonable turnover rate for employees established by experience with individual separations over a period of time. Where there is a termination of a substantial number of the plan participants, it seems clear that such a turnover is not anticipated by the formula. The result is that an employer who has discharged a relatively large number of employees receives a windfall, palpably in excess of acturial assumption, in the form of pension credit forfeitures which he can use to relieve for some time his future premium liability for the remaining employees.

Closely paralleling the preceding argument, Allied claims that the ten-year vesting provision of the Pension Act imposes liability which was not anticipated by Allied or its actuaries. We do not quarrel with their claim that an acceleration of vesting was not anticipated and that the Pension Act impaired Allied's employment agreement in this regard. Nevertheless, we do not believe the obligations imposed by the Pension Act unconstitutionally expand upon the contracting parties initial expectations or the actuaries' original assumptions.

Generally, employer contributions to pension plans are determined in the following fashion. Actuaries first calculate the amount an employer is likely to pay out in benefits over the course of the plan; this calculation, of course, is based on certain assumptions regarding mortality, job changes, and other causes of employee turnover.[4] To meet this anticipated liability, the actuaries next project the amount an employer must contribute to adequately fund these future payments. For example, an actuary may determine that annual contributions of two or three percent of payroll are necessary to meet the first series of anticipated payments and to accumulate an interest-earning reserve to cover the remainder of the plan.

Certainly, Allied did not and could not be expected to anticipate the possibility of vesting at an earlier date for the terminated Minnesota employees. But, the claim that payment to these employees was not anticipated distorts the way actuarial assumptions and funding plans operate and ignores the fact that a portion of Allied's annual contribution was made to accumulate a reserve sufficient to make payments to these employees at some future date. In other words, while the date of payment could not be anticipated, the likelihood of payment was, as was the need, to accumulate a reserve for that purpose.

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[4] *See* n.3, *supra*.. We note again that these assumptions do not include the prospect of plant closure.

We raise the preceding arguments not to suggest that a sufficient fund has accumulated in the Allied pension plan out of which Pension Act liabilities can be paid. In fact, the Pension Act does not impose any liability on pension plan funds for the payment of forfeited benefits. The Act specifically provides that the *employer* is liable for payment of the pension funding charge and that funds already contributed to the plan are to remain for the benefit of continuing employees. *See* Minn. Stat. §§181.03-.07, [*sic*] 181B.02 subd. 18, and 181B.16 (1974). Rather, the arguments raised above are offered to shed some light on the concerns expressed by the Supreme Court in *New York Trust* for the "legitimate expectations of the contracting parties." We believe the obligations imposed by the Pension Act are not so significantly beyond the parties' initial expectations that the Act should be declared unconstitutional.

III. *The Reasonableness and Necessity of the Impairment.*

As reaffirmed in *New York Trust,* the standard for reviewing state legislation impairing private contracts varies with the nature of that contractual relationship. When the state is not a party to the contract, far greater deference is given to the legislative judgment that the impairment is reasonable and necessary to the accomplishment of legitimate policy aims. In granting states broader powers to adopt general regulatory measures, it is probably assumed that the legislature will act impartially and in the best interest of all when it is not itself a party to the contract impaired. Note, *The Constitutionality of the New York Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause,* 125 U.Pa.L.Rev. 167, 188-191 (1976). Since the State of Minnesota was not a party to the contracts allegedly impaired by the Pension Act,[5]

[5] The contracts allegedly impaired by the Minnesota Pension Act are: (1) the employment agreements entered into by Allied and its employees, and (2) the trust agreement between Allied and the trustee of its pension plan.

we must review that legislation with considerable deference to the policy judgments of the Minnesota legislature.

Before addressing the reasonableness and necessity of the Pension Act provisions, we must first examine the various policy aims that led to its enactment. *United States Trust Co. of New York* v. *New Jersey, supra* at 52 L.Ed.2d 112. When plants shut down, employees lose both their jobs and, in many cases, their pension rights. Accumulated pension credits may be forfeited even when terminated employees are within a few months of qualifying for retirement. Bernstein, *Employee Pension Rights When Plants Shut Down: Problems and Some Proposals,* 76 HARV.L.REV. 952 (1962) (hereinafter Bernstein). The loss sustained by separated employees can be viewed either as a future loss of retirements income or as a present loss of compensation corresponding to the amount of employee contributions on their behalf.

Certainly, the State of Minnesota has a strong and legitimate interest in protecting the economic welfare of its senior citizens by assuring the receipt of earned pension benefits as a form of retirement income. The forfeiture of anticipated retirement income is particularly hazardous because it affects individuals at an age when they often

[5] (Continued)
The terms of the employment agreements included wage rates, working conditions and fringe benefits, one of which was a pension plan with vesting to occur after twenty years. The Pension Act allegedly impairs those agreements in that it requires vesting of pension benefits after ten years if Allied ceases to do business or substantially reduces its work force in Minnesota. The terms of the trust agreement require payment by Allied in accord with actuarial projections which are predicated on vesting after twenty years. The Pension Act allegedly impairs that agreement because Allied must incur additional expense to provide benefits for persons whose benefits would be forfeited by plant closure.

have no other source of substantial income.[6] Mass forfeiture of retirement benefits is likely to adversely affect the employees' immediate economic community through the loss of buying power and increased demand for welfare funds and related services.[7]

But, in our judgment, the loss of retirement income is only one aspect of the problem. Pension plans are usually instituted as a means of attracting and holding employees. Berstein, *supra* at 964. Individuals who decide to work for an employer who offers a pension plan over an employer who does not, choose, in essence, to sacrifice the higher salary the non-plan employer may pay for the

[6] The three major sources of income for those of retirement age are private pensions, social security benefits and private savings. *See* C. Siegfried, *"The Role of Private Pensions" in Private Pensions and the Public Interest* 7, 9 (1970). While social security benefits are available to a wide segment of the elderly population, those benefits by themselves seldom provide sufficient income to meet ever-increasing costs of living. *See, e.g.*, R. Nader and K. Blackwell, *You and Your Pension* 13 (1973). And it is widely acknowledged that few individuals are able to accumulate sufficient savings through their working years to provide significant income after retirement. *See generally* M Bernstein, *The Future of Private Pensions* 155-157 (1964).

[7] Congress explicitly recognized the same concerns during hearings on the bills that were eventually enacted into law as ERISA:

> One of the most important matters of public policy facing the nation today is how to assure that individuals who have spent their careers in useful and socially productive work will have adequate incomes to meet their needs when they retire.

S. Rep. No. 93-383, 93rd Cong., 2d Sess. (1974); Pension Reform Act, 8A *U.S. Code Cong. and Adm. News* 508, 516 (1974); H.R. Rep. No. 93-807, 93rd Cong., 2d Sess. (1974), Pension Reform Act, 8A *U.S. Code Cong. and Adm. News* 288, 294 (1974).

security of retirement income. Employer contributions to pension funds must be recognized as a substitute for present compensation. As one authority explains,

> Unions and employers are often quite specific in equating employer pension plan contributions with employee wage compensation. Unions demand increases of X cents per hour in money wages and Y cents per hour in fringe benefits, including pension plan contributions. Employers respond with counteroffers in precisely the same terms.
>
> • • • •
>
> The basic purposes of nonbargained plans are the same as those of bargained plans. As far as employees are concerned the purposes of the plan are to provide income when age forces retirement from employment. • • • Thus, as a general proposition, nonbargained plans seem no less a part of employee compensation than bargained plans.
>
> Since the *Inland Steel*[8] case the courts and the National Labor Relations Board have held pension plans to be "wages" and, in addition, "condition[s] of employment" under the Labor-Management Relations Act of 1947 and its predecessor, the Wagner Act. • • • The demand to bargain [in *Inland Steel*] did not turn the contribution and the pension plan into "wages"; rather it was the nature of the inducement by the company to the employees and the value of the contributions and the benefits to the employees which made them "wages."

Bernstein, *supra* at 960-961.

Thus, the loss sustained by terminated employees has both present and future implications for the employees themselves and for their immediate community we have no trouble concluding that the Minnesota legislature, in en-

[8] *Inland Steel Co.* v. *N.L.R.B.*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960, *cert. granted on other grounds and aff'd*, 338 U.S. 382 (1949).

acting the Pension Act, was addressing a problem of vital public interest.

The next area of inquiry is whether the terms of the Pension Act are reasonably adapted to and necessary for the accomplishment of these vital interests. We think they are. Allied contends that the provisions of the Act are neither reasonable nor necessary because: (1) the Act was designed to benefit only a limited class of persons, (2) the Act does not provide for a grace period during which an employer whose pension plan was not fully funded might reach full funding, and (3) the Act does not permit employers to voluntarily terminate their pension plans.

Admittedly, the Pension Act does not address all the problems existing in private pension programs. The Act prevents only the forfeiture of accumulated pension benefits by substantial numbers of employees when that forfeiture is caused by plant closure. It is well established, however, that in exercising its police powers, a state need not address all aspects of a particular problem. As observed by the Supreme Court in an analogous police power decision,

> [i]n establishing a system of unemployment benefits the legislature is not bound to occupy the whole field. It may strike at the evil where it is most felt.

Carmichael v. *Southern Coal & Coke Co.*, 301 U.S. 495, 519-520 (1937) (citations omitted).

It seems clear that the problem of plant closure and pension plan termination was brought to the attention of the Minnesota legislature when the Minneapolis-Moline Division of White Motor Corporation closed one of its Minnesota plants and attempted to terminate its pension plan. However, Allied's contention that the Pension Act was aimed solely at White Motor retirees is totally unfounded. There is absolutely no evidence from the legislative history or debates on the Pension Act to support Allied's claim that the Act was aimed solely at White Motor Corporation.

Allied's other contentions that a grace period was not allowed and that there was no option to voluntarily terminate its plan can be answered quite simply. Undoubtedly, the Minnesota legislature rejected both of these alternatives because either would have been inconsistent with the Act's central purpose—to assure some measure of retirement income to those affected by present plan closures and plan terminations. Although the legislature might have adopted a less drastic means to accomplish its purpose, the approach it chose is not unreasonable or arbitrary merely because it requires funding to commence from the date of enactment.

IV. *The Commerce Clause Challenge.*

Allied claims that interstate commerce is unreasonably burdened because the Pension Act's funding charge discourages Minnesota employers from terminating their operations in this state and moving them or their investment capital elsewhere. Relying on *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), Allied argues that the Pension Act, in effect, requires business operations to be performed in the home state when those operations could be more efficiently performed in another. *Id.* at 145. In *Pike*, the Supreme Court set forth the standard for determining whether state legislation unduly burdens interstate commerce:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Cement Co. v. Detroit, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of

> the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (citation omitted).

It is clear from the statutory language of the Pension Act that local and interstate commerce are treated alike. Any employer of 100 or more employees who terminates a pension plan or ceases operations in the state is affected by the Act. *See* Minn. Stat. §§181B.02, subd. 2, 181B.03-06. As held above, the Act clearly effectuates a vital and legitimate policy of local interest. Thus, the question becomes whether the burden imposed on interstate commerce is excessive in relation to that legitimate local benefit. We do not think it is excessive.

The Pension Act burdens commerce in much the same way as other forms of employer protection legislation; the costs of doing business in Minnesota are increased to further an important state policy. Costs of a similar nature are imposed by workmen's compensation, unemployment compensation and social security statutes and each has been upheld against constitutional attack. *See Helvering* v. *Davis*, 301 U.S. 619 (1937) (social security); *Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 219 (1937) (unemployment compensation); *Mountain Timber Co.* v. *Washington*, 243 U.S. 219 (1917) (workmen's compensation). The local policy effectuated by the Pension Act is equal in importance to aims achieved by the preceding legislation. In our judgment, this vital interest outweighs the attendant burdens on interstate commerce.[9]

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[9] Two recent Supreme Court cases sustaining Commerce Clause attacks on state legislation do not compel a contrary result. Both involved state interests of considerably less importance. In *Great Atlantic and Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976), the State of Mississippi claimed that a regulation allowing the sale of outstate milk products in Mississippi only if the selling state accepted Mississippi milk products on a reciprocal basis was enacted to maintain state health standards. The Court regarded this purported justification as "border[ing] on

V. *The Due Process Challenge.*

Allied asserts that the Pension Act violates the Due Process Clause of the Fourteenth Amendment by divesting Allied of property rights—the right to withhold pension benefits for failure to meet age and service requirements it had contracted for prior to the Act's passage. The considerations involved in Allied's due process challenge are substantially the same as those previously considered under the Contract Clause. We have held that the Pension Act is a valid exercise of the state's police power aimed at protecting an important and legitimate interest of certain state residents. For that reason, we need only address here those arguments peculiar to Allied's due process challenge: namely, whether the Pension Act is retroactive in application and, if so, whether that retroactivity violates the Due Process Clause.

Allied argues that the Pension Act's funding charge is based on pension benefits earned prior to enactment of the legislation. It is true that the Act does look to service performed prior to enactment to determine the amount of accumulated benefits, but the events which trigger the funding charge all occur after the effective date of the Act, April 10, 1974. Thus, the Act is directed only at forfeitures which arise from plant closures occurring after April 10.

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[9] (Continued)

the frivolous." *Id.* at 375. In *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), an Arizona statute required cantaloupes grown in the state to be packed in conformity with certain standards and approved by a state supervisor. The practical effect of the statute was to compel an Arizona grower, with adequate packing facilities thirty-one miles away in California, to build similar facilities in Arizona. *Id.* at 140. The purpose of the statute was simply "to protect and enhance the reputation of growers within the State." *Id.* at 143. The Court held, "such an incidental consequence of a regulatory scheme could perhaps be tolerated if a mere compelling state interest were involved. But here the State's interest is minimal at best. • • •" *Id.* at 146.

Accord, Willys Motors v. *Northwest Kaiser-Willys,* 142 F.Supp. 469 (D. Minn. 1956). Allied closed its Minnesota plant on July 31, 1974, over three months after the effective date of the Pension Act.

Even if we found the Act to operate retroactively, that alone does not render a statute invalid. It is well settled that legislation aimed at a legitimate local interest may be valid irrespective of any retroactivity. *See, e.g., Usery* v. *Turner Elkorn Mining Co.,* .... U.S. ...., 49 L.Ed.2d 752 (1976); *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962). The Supreme Court set forth the relevant test for determining whether retroactive legislation is valid as an exercise of the state's police power in *Goldblatt* v. *Town of Hempstead, supra* at 594-595:

> To justify the state in * * * interposing its authority in behalf of the public, it must appear—first, that the interests of the public * * * require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

For the reasons stated above, we believe the Pension Act accomplishes a vital public interest, is reasonably adapted to that end and is not unduly oppressive in its impact on Allied. It is valid, therefore, irrespective of any alleged retroactive effect.

VI. *The Equal Protection Challenge.*

Allied commences its equal protection challenge with the claim that in recent years, the "rational basis" standard for determining the validity of state statutes has been replaced by a new test which requires that the classification bear a substantial and significant relation to its claimed objective. *Women's Liberation Union of Rhode Island, Inc.* v. *Israel,* 379 F.Supp. 44, 49-50 (D. R.I. 1974), *aff'd,* 512 F.2d 106 (1st Cir. 1975). *See Dorrough* v. *Estelle,* 497 F.2d 1007, 1011 (5th Cir. 1974); *Lucas* v. *Secretary, Dept. of HEW,* 390 F.Supp. 1310 (D. R.I. 1975). A close examination of these decisions reveals that the emerging middle standard of review, somewhere between the rational basis

test and strict judicial scrutiny, has been applied to classifications falling just short of the "suspect classification" category or of infringing fundamental rights.[10] Recent decisions of the Supreme Court demonstrate unequivocally that where business or economic regulation is at issue and no potentially suspect classification is involved, the traditional rational basis standard still applies. *City of New Orleans* v. *Dukes,* ..... U.S. ....., 49 L.Ed. 2d 511 (1976); *Borass* v. *Village of Belle Terre,* 416 U.S. 1 (1974). Thus, because Allied challenges local economic regulation, we must give considerable deference to the classifications chosen by the legislature and uphold those classifications "if any state of facts reasonably may be conceived to justify [them]." *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911).

The first set of challenged classifications are readily justified under the relevant standard. They are:

1) the Act's regulation of employers with more than 100 employees while failing to cover smaller employers; and

2) the Act's exclusion of state and local government employees and employees of tax-exempt organizations.

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[10] In *Dorrough* v. *Estelle,* 497 F.2d 1007 (5th Cir. 1974), the emerging middle standard was applied to the classifications in a Texas statute denying a criminal appeal to certain classes of criminal escapees. A Rhode Island statute excluding women from certain types of bars was more carefully examined by the court in *Women's Liberation Union of Rhode Island, Inc.* v. *Israel,* 379 F.Supp. 44 (D. R.I. 1974), *aff'd,* 512 F.2d 106 (1st Cir. 1975). Finally, in *Lucas* v. *Secretary, Dept. of HEW,* 390 F.Supp 1310 (D. R.I. 1975), the court followed the standard applied in *Women's Liberation Union of Rhode Island, Inc.* v. *Israel, supra,* to strike down distinctions drawn between legitimate and illegitimate children.

In our judgment, these exclusions are based on rational policy aims. First, national and statewide experience indicated that plan terminations by major private businesses caused hardship to the greatest number of aged citizens and imposed the most severe burden on states to remedy those hardships through public assistance. Certainly, it was not unreasonable for the legislature to fashion a remedy appropriate to the most immediate need. Similarly, tax-exempt organizations and state and local government employees were excluded because the legislature determined the need for protection was greatest in private industry of substantial size. ERISA excludes tax-exempt and public employees for the same reason. 29 U.S.C. §1003(b)(1), (2).

Allied also attacks the exclusion of employers who have made the maximum allowable contribution deductible under §404 of the Internal Revenue Code for a designated sum of years preceding termination. This exclusion is justifiable on the ground that one of the Pension Act's obvious purposes is to encourage employers to fund their plan to the maximum extent possible. It seems perfectly reasonable to exclude those employers who have attempted to maintain a relatively high funding level. The maximum deductible contribution was simply taken as a readily identifiable bench mark for separating out plans more likely to be adequately funded.

Finally, Allied challenges the Pension Act's exclusion of "non-qualified" plans under §401 of the Internal Revenue Code. The defendants argue that this classification was drawn to reduce the coverage of the Act to make it administratively manageable. While we have some doubts about this rationale, there is justification for assuring that state resources allocated to policing the Act are kept within manageable limits. *See Mathews* v. *Lucas*, ... U.S. ....., 49 L.Ed.2d 651 (1976).

For these reasons, we find no violation of the equal protection clause.

In accord with the preceding discussion, the Pension Act is sustained against each constitutional challenge.

This Memorandum Opinion constitutes the Court's findings of fact and conclusions of law. Judgment will be entered in favor of defendants Warren Spannaus, E. I. Malone, Phyllis Spielman and against Allied Structural Steel Company Salaried Employees' Pension Plan. Costs and disbursements will be taxed to the plaintiffs.

DATED: September 2, 1977

(CAPTION OMITTED IN PRINTING)

(FILED SEPTEMBER 22, 1977)

ORDER

The unpublished Memorandum Opinion in the above styled case, filed September 2, 1977, is amended as follows:

ON PAGE 17, LAST PARAGRAPH: Delete from the end of the second sentence the words "Salaried Employees' Pension Plan". The sentence should now read: "Judgment will be entered in favor of defendants Warren Spannaus, E. I. Malone, Phyllis Speilman and against Allied Structural Steel Company."

The Clerk of Court is directed to enter a revised judgment accordingly.

APPENDIX B

CHAPTER 181B

Sec.

181B.01 Citation

181B.02 Definitions

181B.03 Pension refunding charge, vested benefits prior to pension benefits protection act

181B.04 Nonvested benefits prior to act

181B.05 Vested benefits under act

181B.06 Nonvested benefits under act

181B.07 Exceptions to pension funding requirements

181B.08 Notice of intention to cease operations

181B.09 Investigation by commissioner

181B.10 Determination of amount of benefits; agreements as to benefits

181B.11 Certification of amount available

181B.12 Purchase of prepaid deferred annuity

181B.13 Recovery of amounts due

181B.14 Acts constituting termination

181B.15 Rules and regulations

181B.16 Protection of funds from execution or process

181B.17 Effective date; effect of federal act in area

181B.01 CITATION. Sections 181B.01 to 181B.17 shall be known and may be cited as the "private pension benefits protection act".

181.02 DEFINITIONS. Subdivision 1. As used in sections 181B.01 to 181B.17, the following terms shall have the meanings given.

Subd. 2. "Employer" means any person, firm or corporation who employs 100 or more people at least one of whom is employed in this state at any time within one year prior to the date that it ceases to operate a place of employment or a pension plan or such longer period as may be prescribed by the commissioner pursuant to section 181B.14.

Subd. 3. "Place of employment" means any location within this state at which an employer employs any employees at any time within one year prior to the date that the employer ceases to operate at such location or such longer period as may be prescribed by the commissioner pursuant to section 181B.14.

Subd. 4. "Employee" means any person employed at the place of employment at any time within one year prior to the date when the employer ceases to operate the place of employment or a pension plan or such longer period as may be prescribed by the commissioner pursuant to section 181B.14. "Employee" also means any person who is not employed by the employer but who was formerly employed in this state, and is eligible or will be eligible without the earning of additional pension credits to receive a pension benefit from the employer's pension plan.

Subd. 5. "Commissioner" means the commissioner of labor and industry.

Subd. 6. "Ceases to operate a place of employment or a pension plan" means:

(a) The complete termination of operations at a place of employment, or

(b) A substantial reduction in the number of employees at a place of employment, or

(c) The termination or substantial reduction of pension plan operations or benefits for all or a portion of an employer's employees.

The term shall not mean any temporary cessation of operations or reduction of employees. Neither shall the

term mean any cessation of operations by a single employer who participates in a pension plan to which more than one employer makes contributions if such cessation does not also entail the termination of the master pension plan. In determining whether any reduction has been substantial the commissioner shall take into consideration not only the absolute size of the reduction but the relative size of the reduction as it relates to the corporate and employment history of the group or subgroup suffering the reduction. In addition, the commissioner may find that a number of unsubstantial reductions are, for the purposes of sections 181B.01 to 181B.17, equivalent to a substantial reduction. When an employer ceases to operate a place of employment or a pension plan but offers to retain without loss of pension credit all of the employees in comparable jobs with equal or increased compensation at another location within the state or at some other location outside this state as specified in any voluntary agreement authorized by section 181B.10, sections 181B.01 to 181B.17 shall not apply except as it affects persons not employed by the employer but who are eligible or will be eligible without the earning of additional pension credits to receive the pension benefits from the employer's pension plan.

Subd. 7. "Pension plan" means any plan, fund or program which is established, maintained or entered into by an employer for the purpose of providing retirement benefits for its employees, or their beneficiaries and which is designated as a qualified pension plan under section 401 of the United States Internal Revenue Code of 1954 as amended, but does not mean any plan established by colective bargaining agreement which is excluded from the coverage of 29 U.S.C. 186(c) (5) (B) by 29 U.S.C. 186(g) and for which the employer has no administrative responsibility and no responsibility for the establishment of the retirement benefit schedule. Sections 181B.01 to 181B.17 shall not apply to any retirement fund or program providing benefits only for public employees of the federal government or the state government or a subdivision of

the state, nor shall it apply to any pension plan established on behalf of a religious, charitable, or educational organization as defined by Section 501(c) (3) of the United States Internal Revenue Code of 1954 as amended. Further, sections 181B.01 to 181B.17 shall not apply to any money purchase, profit sharing, or stock bonus plan in which no definitely determinable level or benefits is stipulated to be given to qualified plan participants at normal retirement age or some other age.

Subd. 8. "Normal retirement benefit" means that benefit payable under a pension plan in the event of retirement at the normal retirement age.

Subd. 9. "Normal retirement age" means the lesser of either the normal retirement age as prescribed by the pension plan or age 65.

Subd. 10. "Accrued portion of the normal retirement benefit" with respect to employees of ten or more years of covered service means the larger of either the present value of the pension benefit which the employee has earned prior to cessation under the terms of the pension plan itself or the present value of the normal retirement benefit to which the employee would be entitled under the plan as in effect on the date of the cessation if he continued to earn pension credits based on the covered service he would have accumulated had he continued as a plan participant until normal retirement age or if he continued to earn annually until normal retirement age the same rate of compensation as that which he had been earning prior to cessation, upon which his pension credit would have been computed under the plan at the rate specified by the plan for the years subsequent to the cessation, multiplied by a fraction not to exceed one, the numerator of which is the total number of his years of covered service as of the date of cessation, and the denominator plan as of normal retirement age if he had continued to be an active participant in the plan until attaining such age.

With respect to employees with less than ten years of covered service, the defining term means the present value

of the total amount of pension benefits which have been vested on or prior to the date of cessation. Where the above formulas are inapplicable or inequitable the defined term means that portion of the normal retirement benefit to which the commissioner determines actuarially the employee should be entitled based on the covered service of the employee, as of the date of the cessation.

Subd. 11. "Covered service" means the longer of either:

(a) The period of employment with an employer including predecessor employers as allowed in section 181B.07, clause (1) which is recognized under the terms of the employer's pension plan for the purposes of determining either an employee's eligibility to receive benefits under the plan or the amount of such benefits, or

(b) The amount of time after institution of the present pension plan or any substantially similar predecessor plan that an employee has been continuously employed in a full time capacity by an employer including predecessor employers as allowed in Section 181B.07, clause (1) prior to the cessation of operations. Temporary and seasonal layoffs and unpaid vacations and leaves of absence need not be credited as covered service but neither shall they serve to interrupt an employee's continuity of service. Part time employment may be credited as covered service if the commissioner determines that a previous full time employee has been reduced to part time status as part of a plan to evade provisions of sections 181B.01 to 181B.17.

Subd. 12. "Vested right" means a legal right obtained by an employee participating in a pension plan to that part of an immediate or deferred pension benefit which arises from the employee's covered service under the plan and is no longer contingent on the employee remaining covered under the plan.

Subd. 13. "Vested pension benefit" means that accrued portion of the normal retirement benefit of an employee participating, or who has participated, in a pension plan to which the employee has a vested right.

Subd. 14. "Nonvested pension benefit" means the accrued portion of the normal retirement benefit of an employee participating in a pension plan to which the employee does not have a vested right.

Subd. 15. "Present value of the total amount of nonvested pension benefits" means that sum of money which if earning interest in a secure investment from the date of cessation of operations onward would equal the value of the nonvested pension benefit on the date on which the plan participant reached normal retirement age.

Subd. 16. "Present value of the total amount of vested pension benefits" means that sum of money which if earning interest in a secure investment from the date of cessation of operations onward would equal the value of the vested pension benefit on the date on which the plan participant reached normal retirement age minus that sum of money which is set aside in trust or exclusively reserved to finance pension benefits for plan participants.

Subd. 17. "Present value of the normal retirement benefit" means that sum of money which is earning interest in a secure investment from the date of the cessation of operations onward would equal the value of the normal retirement benefit on the date on which the plan participant reached normal retirement age.

181B.03 PENSION REFUNDING CHARGE, VESTED BENEFITS PRIOR TO PENSION BENEFITS PROTECTION ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of vested pension benefits based upon covered service occurring before April 10, 1974 of such employees of the employer who have completed ten or more years of

any covered service under the pension plan of the employer and whose vested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such vested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.04 NONVESTED BENEFITS PRIOR TO ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by section 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of nonvested pension benefits based upon service occurring before April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose nonvested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such nonvested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.05 VESTED BENEFITS UNDER ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of vested pension benefits based upon covered service occurring after April 10, 1974 of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose vested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such vested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.06 NONVESTED BENEFITS UNDER ACT. Every employer who hereafter ceases to operate a place of employment or a pension plan within this state shall owe to his employees covered by sections 181B.01 to 181B.17 a pension funding charge which shall be equal to the present value of the total amount of nonvested pension benefits based upon covered service occurring after April 10, 1974, of such employees of the employer who have completed ten or more years of any covered service under the pension plan of the employer and whose nonvested pension benefits have been or will be forfeited because of the employer's ceasing to operate a place of employment or a pension plan, less the amount of such nonvested pension benefits which are compromised or settled to the satisfaction of the commissioner as provided in sections 181B.01 to 181B.17.

181B.07 EXCEPTIONS TO PENSION FUNDING REQUIREMENTS. An employer shall not be liable for any pension funding charge under sections 181B.03 to 181B.06 when (1) the employer ceases to operate a place of employment or a pension plan as a result of merger, consolidation, or acquisition of assets, if the successor to the employer continues the pension plan of the employer or establishes a comparable pension plan which covers all previously covered employees of the employer with no reduction in credited covered service for purposes of sections 181B.01 to 181B.17 and no reduction in the value of the pension credits already earned by the employees; or (2) the employer ceasing to operate a place of employment or a pension plan has (a) in each of the five years prior to cessation made a contribution to the pension plan at least equal to the maximum contribution which would have been exempt from income taxation under Section 404 of the United States Internal Revenue Code of 1954 as amended, or (b) in at least eight of the ten years immediately prior to cessation made a contribution to the pension plan at least equal to the maximum contribution which would have been exempt from income taxation under Section 404 of

the United States Internal Revenue Code of 1954 as amended, or (c) when the pension plan has been instituted less than five years prior to cessation, in every year since the institution of the plan, made a contribution to the pension plan at least equal to the maximum contribution which would have been exempt from income taxation under Section 404 of the United States Internal Revenue Code of 1954 as amended.

181B.08 NOTICE OF INTENTION TO CEASE OPERATIONS. Any employer who intends to cease to operate a place of employment or a pension plan within this state shall notify the commissioner of such intention not later than six months prior to the date the employer intends to cease such operation. In the case of an employer who intends to cease to operate a place of employ ment or a pension plan within this state within six months of April 10, 1974, the notice required by this section shall be given by the employer as soon as practicable, but not later than ten days after April 10, 1974.

181B.09 INVESTIGATION BY COMMISSIONER. Upon receipt of such notification, or upon his own initiative when such notification is not given as required, the commissioner shall cause an investigation to be made of the employer to determine the number of employees who have completed ten or more years of covered service under the pension plan of the employer and whose nonvested or vested pension benefits have been or will be forfeited by such cessation, the number of employees whose vested pension benefits have been or will be forfeited by such cessation, the number of employees whose vested pension benefits have been or will be forfeited by such cessation, the amounts of such nonvested or vested pension benefits, if any, of such employees and the pension plan for such employees as may be necessary or useful to the commissioner to carry out his duties and responsibilities under sections 181B.01 to 181B.17. The investigation, insofar as practicable, shall be conducted at the employer's place of business during normal business hours. The employer

shall cooperate fully with the commissioner in such investigation, and shall make available to him any books, records or other information necessary or useful to such investigation. To aid in such investigations, the commissioner is authorized to administer oaths and affirmations and to issue subpoenas to compel the attendance of witnesses or the production of books, records or other documents. The commissioner may seek, through the attorney general acting on his behalf, orders from any court of competent jurisdiction to compel an employer to comply with the provisions of sections 181B.01 to 181B.17 and to punish disobedience of any subpoena issued pursuant to sections 181B.01 to 181B.17.

181B.10 DETERMINATION OF AMOUNT OF BENEFITS; AGREEMENTS AS TO BENEFITS. As part of the investigation of an employer, the commissioner shall determine the amount of nonvested and vested pension benefits which have been compromised or settled to his satisfaction. Nonvested and vested pension benefits may be compromised or settled by voluntary agreement between the employer and individual employees which is mutually understood by both parties to be a complete and final satisfaction of the employer's obligations regarding such benefits, provided that both parties are made fully aware of their rights and obligations under section 181B.01 to 181B.17 prior to the making of such voluntary agreement. Before any such settlement can be made it must be approved by the commissioner. The commissioner shall not approve any settlement that is not fair and equitable. Further, for all settlements entered into by the employer the relationship between the present value of the compromised pension credits and the value of the settlement must be as constant as is practicable.

181B.11 CERTIFICATION OF AMOUNTS AVAILABLE. After the investigation of the employer the commissioner shall certify to the employer the present value of the total amount of nonvested and vested pension benefits which are includable in determining an employer's pension funding charge liability under sections 181B.01 to 181B.17 and the amount of such benefits which have

been compromised or settled to the satisfaction of the commissioner. When the assets of an employer available for distribution under sections 181B.01 to 181B.17 are less than the sum total of the pension funding charges owed to employees as calculated by the commissioner, the commissioner shall calculate the proportion of available assets owed to each employee so that the actual amount to be received by any covered employee at normal retirement age divided by the amount that employee would have received at normal retirement age had there been no shortage of assets available for distribution under sections 181B.01 to 181B.17 is a ratio as constant as is possible from employee to employee. In seeking to keep such ratio constant the commissioner shall consider the amounts to be received by an employee from trust fund assets set aside for employee pension benefits but unavailable for distribution under section 181B.01 to 181B.17. The amount certified by the commissioner shall be due and payable to the employees in the manner specified in section 181B.12 on the date that the employer ceases to operate its place of employment or a pension plan and shall be a lien upon the employer's assets. If the pension funding charge is not paid when due, the employer shall be liable for interest on the amount due at the rate of eight percent per annum until the charge and interest are paid, and the attorney general of this state shall bring action in an appropriate district court of this state or in the courts of another state or in an appropriate federal court as provided for in section 181B.13.

181B.12 PURCHASE OF PREPAID DEFERRED ANNUITY. The amount certified by the commissioner as due and payable to the employees shall be paid to the employees by the employer through the purchase of a prepaid deferred annuity payable to the employee when he reaches normal retirement age or to his beneficiary upon the employee's death. Such purchase shall be made through a trust authorized by the United States Internal Revenue Service to make such purchases in a manner which exempts from federal income taxation the money used to purchase the annuity and all income earned by such annuity up to

the date of the distribution of the annuity amount. In no event shall the amount of annuity to be distributed at normal retirement age exceed the amount of the accrued normal retirement benefit.

181B.13 RECOVERY OF AMOUNTS DUE. The commissioner shall maintain a separate record of each employee owed a pension funding charge under section 181B.01 to 181B.17. Ten days after any pension funding charge is due the commissioner shall tabulate all unpaid amounts and certify that figure to the attorney general who shall immediately take appropriate legal action as authorized in section 181B.11 on behalf of all aggrieved employees in a class action suit.

181B.14 ACTS CONSTITUTING TERMINATION. For the purposes of sections 181B.01 to 181B.17, the employment of any employee involuntarily terminated within one year of the date an employer ceases to operate a place of employment or a pension plan within this state, or within such longer period as prescribed by the commissioner when he determines that an employer is attempting to evade the provisions of sections 181B.01 to 181B.17, shall be deemed to have been terminated because of the employer's ceasing to operate its place of employment or a pension plan, unless the employer can conclusively show that the termination was attributable to some other cause.

181B.15 RULES AND REGULATIONS. The commissioner may promulgate rules and regulations to provide for the efficient administration of the provisions of sections 181B.01 to 181B.17, or to clarify such provisions as may be necessary to effectuate the purposes of sections 181B.01 to 181B.17, and may from time to time specify any appropriate actuarial assumptions necessary to effectuate the purposes of sections 181B.01 to 181B.17.

181B.16 PROTECTION OF FUNDS FROM EXECUTION OR PROCESS. The funds of any employer which are set aside or reserved for benefits under a pension plan of the employer to which employees have a vested right shall not be liable to levy or attachment by virtue

of any execution or civil process whatever, issued out of any court of this state, for the collection of the pension funding charge imposed by sections 181B.01 to 181B.17.

181B.17 EFFECTIVE DATE: EFFECT OF FEDERAL ACT IN AREA. Sections 181B.01 to 181B.17 shall take effect the day following final passage. Provided that sections 181B.01 to 181B.17 shall become null and void upon the institution of a mandatory plan of termination insurance guaranteeing the payment of a substantial portion of an employee's vested pension benefits pursuant to any law of the United States.

APPENDIX C

NOTICE OF APPEAL

(CAPTION OMITTED IN PRINTING)

(FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, THIRD DIVISION, ON SEPTEMBER 28, 1977)

TO: DEFENDANTS AND THEIR ATTORNEY, KENT G. HARBISON, SPECIAL ASSISTANT ATTORNEY GENERAL, 515 Transportation Building, St. Paul, Minnesota 55155

Notice is hereby given that Walter J. Fleck, Edythe A. Hamler, E. A. Richert, and Allied Structural Steel Company, the plaintiffs above named, hereby appeal to the Supreme Court of the United States, pursuant to 28 U.S.C. § 1253, from the final judgment entered in this action on September 2, 1977, and the revised final judgment entered on September 22, 1977.

/s/ JOHN R. KENEFICH
John R. Kenefich
W-2200 First National Bank Bldg.
St. Paul, Minnesota 55101
(612) 291-1215
Attorney for Plaintiff

Dated: September 27, 1977

(CERTIFICATE OF SERVICE OMITTED IN PRINTING)